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## **Transfer Pricing Aspects of Business Restructurings**

Dear Mr. Owens,

We are deeply grateful to have the opportunity to comment on the discussion draft "Transfer Pricing Aspects of Business Restructurings". We thank the authors for the work they have done, and also we would like to thank the OECD for having made this important work possible. We very much welcome more detailed guidance regarding the application of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

First of all we want to point out that we fully support the BIAC comments on the discussion draft. BIAC particularly states:

- The draft is a useful starting point for building a common understanding of how international tax principles and transfer pricing concepts apply in business restructurings.
- Restructurings are part of the day-to-day business to ensure efficiency and competitiveness and use to have sound commercial reasons.
- The draft seems to be excessive with regard to documentation requirements.
- The taxpayer's allocation of risk should be respected in every case where the contractual allocation is clear and followed in practice. The definition of control should be refined by using the criteria of *responsibility*.

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- Levying taxes on the cross border transfer of functions is incompatible with the arm's length principle. This kind of exit taxation would lead to double taxation of the same profits.
- Ambivalences in the draft allow diverging interpretations. They could give rise to avoidable difficulties.

We would like to underline some aspects we consider of special importance.

1. Many of the reflections in the draft give the impression that they are actually focused on the prevention of abuse, even though the scope and intention of the draft is only to give general guidance. We think that there should be – especially regarding the control of risk requirement – a clearer distinction between structures that are commonly used by multinational enterprises and cases where a brass plate company residing in a tax haven is just collecting money from related companies around the world. MNEs need to reorganise their structures to provide more centralised control and management. There is high pressure to do so, not only by shareholders but also from legislation.
2. There should be more emphasis put on clarifying that the non-recognition of a transaction should be a very rare exception.

Every such non-recognition leads to double taxation risks, because the involved administrations might claim taxes on diverging bases of assessment. Therefore “options” – if considered – might in some cases be helpful to determine the arm's length price of a transaction. However, there should be almost no case of eventual non-recognition.

Moreover, taking into account “realistically available options” endangers the crucial principle that it is the owner who has to make all the decisions and finally bear all the risks. Restrictions to this principle cannot be justified by the mere existence of a realistically available option. The option should be highly advantageous and this advantageousness should be of very high obviousness.

Additionally it has to be mentioned that giving optional transactions more importance means at the same time increasing the burden of documentation.

3. Par. 196 states that MNEs are free to organise their business operations as they see fit. The draft's conclusion – given in par. 18.4 and par. 212 – that tax savings are commercially rational from an Article 9 perspective is an important benchmark. Despite the fact – as is set out in par. 8 – that national anti-abuse rules are not within the scope of the draft, we hope that the

OECD will continue to foster a growing consensus on that point. Commercially rational behaviour of MNEs includes considering tax consequences in cross border structures as well as restructurings. This commercial rationality will not only benefit to the MNEs themselves, but also to the world economic growth as a whole.

4. As the paper on the one hand offers an interesting variety of detailed reflections, it sometimes on the other hand provides less clarity than its reader might wish to find:
- Par. 34: We propose to add: In these cases the parties are free how to allocate the risk.
  - Par. 53 et seq. describe the role of synergies as they might be a motivation for a restructuring, but par. 61 as well as the other parts of the draft do not give advice on how the arm's length price will be influenced. Beside a small hint in par. 175, par. 96 only mentions an extraordinary case.
  - Par. 118 et seq.: It should be added that there might be cases where no indemnification at all would have to be paid.
  - Par. 172: To allocate cost savings to the principal might be justified in cases where he undertakes to acquire the applied goods or bears other risks.

Yours sincerely,



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The Federation of German Industries (BDI) is an association of associations. The BDI is the umbrella organisation of German industry and industry-related service providers. It represents 36 industrial sector federations and has 15 regional offices in the German Länder. BDI speaks for more than 100,000 private enterprises employing around 8 million people. Membership is voluntary.